IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31470

STATE OF IDAHO,	)	
	)	**2006 Opinion No. 32**
Plaintiff-Respondent,	)	
	)	**Filed: May 12, 2006**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
WILLIAM ARTHUR,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

Order denying motion to withdraw guilty plea, affirmed; order granting I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Courtney E. Beebe, Deputy Attorney General, Boise, for respondent.

PERRY, Chief Judge

William Arthur appeals from the district court's order denying his motion to withdraw his guilty plea. Arthur also appeals from the district court's order granting his Idaho Criminal Rule 35 motion for reduction of sentence. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Arthur was arrested for stealing jewelry from the home of his aunt and uncle when he was living as a guest in their home. The state charged Arthur with grand theft, I.C. § 18-2403, 18-2407; burglary, I.C. § 18-1401; and resisting and obstructing officers, I.C. § 18-705. Part two of the charging information alleged that Arthur was a persistent violator, I.C. § 19-2514, based on four prior Washington State felony convictions for first degree rape of a child, second degree robbery, second degree assault, and taking a motor vehicle without permission. On the day the

case was set for trial, Arthur entered an *Alford*[1] plea to grand theft and admitted to being a persistent violator in exchange for dismissal of the other charges. Prior to sentencing, Arthur moved the district court to withdraw his plea after seeing his presentence investigation report (PSI) indicating he had been convicted of or charged with numerous other felonies and misdemeanors. Arthur's motion to withdraw plea originally sought to withdraw the entire plea. At the hearing on the motion, Arthur informed the district court that he only sought to withdraw his plea as to the admittance of being a persistent violator. The district court denied the motion after hearing testimony and oral argument. The district court sentenced Arthur to a unified term of life imprisonment, with a minimum period of confinement of two years. Arthur filed an I.C.R. 35 motion for reduction of sentence, presenting new information to the district court that he was seriously ill. The district court granted the motion, reducing Arthur's term to a unified sentence of life imprisonment, with a minimum period of confinement of one year and ten months. Arthur appeals.

II.
ANALYSIS

A. Withdrawal of Plea

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* Also of importance is whether the motion to withdraw a plea is made before or after sentence is imposed. When moving for a withdrawal of guilty plea prior to sentencing, the defendant bears the burden of proving a just reason for withdrawing the plea, whereas the district court may allow withdrawal of a guilty plea after sentencing only to correct a manifest injustice. I.C.R. 33(c); *State v. Mayer*, 139 Idaho 643, 647, 84 P.3d 579, 583 (Ct. App. 2004). Even when the motion is presented before sentencing, if it occurs after the defendant has learned the content of the PSI or has received other information about the probable sentence, the district court may temper its liberality by weighing the defendant's apparent motive. *Id.* In order to be valid, a guilty plea must be voluntary, and voluntariness requires that

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[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

the defendant understand the nature of the charges to which he or she is pleading guilty. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Mayer*, 139 Idaho at 647, 84 P.3d at 583.

During the hearing on Arthur's motion to withdraw his plea, he sought only to withdraw his admission to being a persistent violator. On appeal, Arthur argues that he felt pressured to agree to admit being a persistent violator, that he wanted only to plead guilty to grand theft, and that he was confused and did not make an informed choice when admitting to being a persistent violator.

At the withdrawal of guilty plea hearing, the district court found that Arthur, his counsel, counsel for the state, and the district court had a lengthy discussion regarding the persistent violator portion of the plea just prior to the scheduled jury trial and that Arthur's potential sentence, with the inclusion of the persistent violator charge, was fully discussed at that time. The district court went on to find that at the time Arthur's guilty plea was entered, he was fully informed on what he was pleading guilty to and the consequences of that plea, all of which he agreed with and stated on the record that he understood. The district court then found that Arthur provided no evidence that the prior convictions that formed the basis for his persistent violator admission were invalid. Based on these findings, the district court denied Arthur's motion to withdraw his guilty plea as Arthur failed to demonstrate just cause to withdraw his plea.

Upon review of the record, Arthur has failed to show that he did not understand what charges he was pleading guilty to or the potential length of sentence that could be imposed for those charges. The district court's denial of the motion to withdraw Arthur's guilty plea was not arbitrary in view of Arthur's failure to show just cause for withdrawal and his knowledge of the contents of his PSI. Therefore, the district court did not abuse its discretion in denying Arthur's motion.

B. Rule 35 Motion

Arthur asserts the district court abused its discretion in not reducing his sentence further than it did when the district court granted Arthur's Rule 35 motion. Arthur urges this Court to review both the determinate and indeterminate portions of his sentence. Arthur argues review of the indeterminate portion of his sentence is appropriate because the disparity between the respective lengths of the determinate and indeterminate portions of his sentence is a special circumstance. Alternatively, Arthur argues the fact that he has served the determinate portion of his sentence, and has been denied parole, is also a special circumstance. Finally, Arthur

contends the district court abused its discretion in not further reducing his sentence given his grave medical condition.

Initially, we note that a lower court's decision to grant or deny a Rule 35 motion will not be disturbed in the absence of an abuse of discretion. *State v. Villarreal*, 126 Idaho 277, 281, 882 P.2d 444, 448 (Ct. App. 1994). Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established. *See State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). Since the district court later modified Arthur's sentence, pursuant to his Rule 35 motion, we will only review his modified sentence for an abuse of discretion. *See State v. McGonigal*, 122 Idaho 939, 940-41, 842 P.2d 275, 276-77 (1992). If the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reduction. *Hernandez*, 121 Idaho at 117, 822 P.2d at 1014.

When reviewing a sentence imposed under the Uniform Sentencing Act, we treat the minimum period of incarceration as the probable duration of confinement. I.C. § 19-2513; *State v. Sanchez*, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). By focusing on this period, we do not wholly disregard the aggregate length of the sentence, but we recognize that a defendant will be eligible for parole at that time. *Id.* The indeterminate portion of a sentence will be examined on appeal only if the defendant shows that special circumstances require consideration of more than the fixed period of confinement. *State v. Bayles*, 131 Idaho 624, 628, 962 P.2d 395, 399 (Ct. App. 1998); *State v. Herrera*, 130 Idaho 839, 840, 949 P.2d 226, 227 (Ct. App. 1997).

Arthur argues that, because the determinate portion of his sentence is so short and the indeterminate portion is much longer, any meaningful review of the sentence must include both the determinate and indeterminate portions of his sentence. As stated above, when reviewing a sentence we do not wholly disregard the entire aggregate length of the sentence. *Sanchez*, 115 Idaho at 777, 769 P.2d at 1149. However, the fact that the indeterminate portion is significantly longer then the determinate portion of his sentence does not rebut the presumption that the determinate portion is the probable term of confinement.

Upon motion by Arthur, this Court took judicial notice of the fact that Arthur was denied parole by the parole commission and received a full term release date. Arthur contends that, having been denied parole, he is subject to life imprisonment with no realistic possibility for review, providing a special circumstance requiring this Court to review the indeterminate portion of his sentence. This Court has previously ruled that serving the determinate portion of a defendant's sentence, and being denied parole, rebuts the presumption that the determinate term is the probable measure of confinement. *See Casper*, __ Idaho __, __ P.3d __ (Ct. App. 2006); *Huffman*, __ Idaho __, ___ P.3d __ (Ct. App. 2006). In *Casper*, we determined that when an appellant has served his or her determinate term, but has not yet been denied parole, it was not by itself a special circumstance requiring appellate review of his indeterminate sentence. In *Huffman*, we determined that, even though in an unrelated case the Commission of Pardons and Parole had found the appellant ineligible for parole, in the case before us he had yet to serve his determinate term and as such had not rebutted the presumption that it was his probable term of confinement.

Here, Arthur has served his determinate term and been denied parole and passed on to his full term release date. Arthur has not, however, been found to be ineligible for parole and he may still petition for release on parole. We are then unable to speculate as to the actual term of confinement because whether Arthur is granted parole upon such a petition remains entirely vested in the Commission of Pardons and Parole. *See State v. Sherer*, 121 Idaho 263, 265, 824 P.2d 194, 196 (Ct. App. 1992). Because Arthur is still eligible for parole, we conclude that serving his determinate term and being initially denied parole is not a special circumstance.

Arthur has failed to show that the disparity between the determinate and indeterminate portion of his sentence or his denial of parole is a special circumstance. Therefore, we need only focus our review upon the determinate portion of Arthur's reduced sentence.

A person convicted for the third time of the commission of a felony either within the state of Idaho, or in another state, shall be considered a persistent violator and may be sentenced to life imprisonment. I.C. § 19-2514. Because the sentence here is within the statutory limits, Arthur has the burden of showing a clear abuse of discretion on the part of the district court in failing to further reduce the sentence on his Rule 35 motion. *See State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979).

Arthur's Rule 35 motion for reduction of sentence was made on the grounds that the district court did not take into consideration his terminal illness. Arthur provided new medical information to the district court demonstrating he suffers from a terminal illness. In his Rule 35 motion, Arthur did not offer any other substantial argument or evidence that his original sentence was unreasonable at the time of pronouncement.

The new information regarding Arthur's medical condition was sufficient to persuade the district court to reduce Arthur's sentence to a unified term of life imprisonment, with a minimum period of confinement of one year and ten months. Arthur argues on appeal that he fears, due to the indeterminate portion of his sentence, he may die in prison. At his initial sentencing, the district court held that it was assigning a relatively short determinate sentence so that Arthur would have a fairly early opportunity for the parole commission to make a decision as to whether his therapeutic progress was sufficient to release him into the community. Upon considering Arthur's Rule 35 motion and the newly presented evidence of his medical condition, the district court reduced Arthur's determinate term, further hastening his possibility for parole, in light of his grave illness and consequentially shortened life expectancy.

Arthur challenges only the district court's order granting his Rule 35 motion. The medical information that he suffered from a terminal illness, upon which Arthur sought a reduction of sentence in his Rule 35 motion, was taken into account by the district court. Arthur's lengthy history of violence, property and sex crimes, and the accompanying potential danger he continues to present to the community, cannot be fully expunged by his illness. Upon granting Arthur's Rule 35 motion, the district court further reduced what was already a short determinate portion of Arthur's sentence for the crime of grand theft with a persistent violator enhancement. Therefore, Arthur has failed to show that the district court abused its discretion in granting his Rule 35 motion.

III.
CONCLUSION

The record demonstrates Arthur's guilty plea was fully informed and voluntary, and the district court did not abuse its discretion in denying Arthur's motion to withdraw his plea. The disparity between the determinate and indeterminate portions of Arthur's sentence is not a special circumstance requiring separate review of the indeterminate portion nor is the initial denial of Arthur's parole after serving the determinate portion of his sentence. In reducing

Arthur's sentence by granting his Rule 35 motion, the record indicates the district court considered the new evidence of Arthur's terminal illness. Accordingly, the district court did not abuse its discretion in not further reducing Arthur's sentence when granting his Rule 35 motion. The order denying Arthur's motion to withdraw his guilty plea and the order granting Arthur's Rule 35 motion to reduce his sentence are affirmed.

Judge GUTIERREZ, **CONCURS.**

Judge LANSING, **CONCURRING IN THE RESULT**

I concur with part II(A) of the majority opinion affirming the denial of Arthur's motion to withdraw his guilty plea, but I disagree with my colleague's analysis in part II(B) concerning the review of Arthur's sentence. As I did in *State v. Huffman*, Docket No. 31836 (Ct. App. Feb. 2, 2006) (Lansing, J., concurring in the result), I conclude that the defendant here has demonstrated a special circumstance that obligated this Court to review the indeterminate term of his sentence. The Commission of Pardons and Parole has already denied parole to Arthur at the conclusion of his fixed term of imprisonment and has expressly passed him to his "full-term release date," meaning that the Commission does not intend to set any further parole hearings for Arthur. Although this does not *preclude* the Commission from someday conducting another parole hearing at Arthur's request, it certainly signals a present conclusion of the Commission that Arthur should serve the full indeterminate term of his sentence.

The majority opinion continues to express the oft-repeated rule of this Court that in conducting sentence reviews focusing on the determinate term, "we do not wholly disregard the aggregate length of the sentence" and that "the indeterminate portion of the sentence will be examined if the defendant shows that special circumstances require consideration of more than the fixed period of confinement." Nevertheless, the majority's position--that even the Commission's act of passing the defendant to his full-term release date does not demonstrate such a special circumstance--amounts to an abandonment of that rule. If neither the showing made by Arthur here, nor that made by the defendant in *Huffman*, is sufficient to show a probability that the full indeterminate term will be served, it appears that no defendant ever could make such a showing. As I noted in *Huffman*, if what the majority requires is absolute certainty that the defendant will serve the entire sentence before this Court will exercise review of the indeterminate term, then the standard can never be met.

Because in my view Arthur has presented a special circumstance that triggers this Court's obligation to review the indeterminate term, I have conducted such a review. In doing so, I have considered the unusual disparity between the determinate term of one year and ten months and the indeterminate term of life imprisonment, a disparity so extreme as to at first blush create misgivings about the rationality of the sentence. As a general proposition, it would seem highly unlikely that the nature of an offense and the offender's character could require as little as one year and ten months of imprisonment in order to satisfy the objectives of sentencing,[1] yet might also require as much as a full life sentence to satisfy those objectives. Therefore, some skepticism may be appropriate in reviewing an indeterminate term that is so disproportionate to the determinate portion of the sentence.

Nevertheless, I conclude that the indeterminate portion of Arthur's sentence is reasonable because the disparity appears to be attributable to great *leniency* on the part of the district court in fixing the determinate term rather than to unjustifiable severity in the indeterminate term. Arthur's present offense, grand theft of jewelry valued at about $1,500, is comparatively minor as felonies go, but his criminal record demonstrates that he presents a serious threat to society. He had prior felony convictions for robbery (twice), assault, possession of stolen property, and rape of a child. Other felony charges of robbery and possession of stolen property were reduced to misdemeanors. His record shows a history of continuous criminality from 1979 to the present, excepting a period of about twelve years when he was imprisoned in the state of Washington. Although it was not articulated in this fashion by the district court, it appears that the court may have chosen such a brief determinate term for Arthur's sentence in recognition of his severe illness and to allow the Commission to quickly grant parole if adequate medical treatment could not be provided to Arthur in the prison setting. On this record, I cannot conclude that the district court abused its discretion by imposing an indeterminate term of life imprisonment even if it is assumed that Arthur will serve that entire term in confinement. Therefore, I concur with the majority's view that the judgment of conviction and sentence should be affirmed.

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[1] The objectives of sentencing, against which the reasonableness of the sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offenders, and punishment or retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In examining the reasonableness of a sentence, the reviewing court focuses on the nature of the offense and the character of the offender. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991).